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Nos. 84-363

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

NORTHEAST BANCORP INC.,
UNION TRUST COMPANY,
and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent

AND

BANK OF NEW ENGLAND CORPORATION,
CBT CORPORATION, HARTFORD NATIONAL
CORPORATION, BANK OF BOSTON, THE
COMMONWEALTH OF MASSACHUSETTS AND
THE STATE OF CONNECTICUT
Intervenor-Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF INTERVENOR COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. In light of the historical policies of decentralized banking and deference to the states in matters of bank expansion, as well as the narrow practical consequences of the decision of the Second Circuit Court of Appeals to uphold Massachusetts and Connecticut statutes allowing only limited interstate banking, does this case merit plenary review?

2. Given the authority of Congress over interstate banking, does this case merit plenary review?

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STATEMENT OF THE CASE

Pursuant to the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841 et seq, the Board of Governors of the Federal Reserve System ("Board") approved three applications for the interstate acquisition of Connecticut and Massachusetts bank holding companies. In considering the applications, the Board weighed the impact of the 1982 Massachusetts Interstate Banking Act, Mass. St. 1982, c. 626 ("Massachusetts Act"),[1/] and its Connecticut counterpart, 1983 Conn. Act. 83-411 (Reg. Sess.).[2/] In its orders,

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1/ The Act is codified in Mass. Gen. Laws Ann. ch. 167, §§ 38-39, and Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1984).

2/ Those applications included: the Hartford National Corporation, a

(footnote continued)

the Board found "no clear and unequivocal basis" for determining that those statutes violate the Commerce, Compact, and Equal Protection clauses of the United States Constitution. (Pet. App. 41, 74-75, 83-84)

The Court of Appeals affirmed the decisions of the Board.[3/] The court concluded that the Massachusetts Act is authorized by the Douglas Amendment to

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(footnote continued)

Connecticut bank holding company, to acquire Arltru Bancorporation, a Massachusetts bank holding company; Bank of New England Corporation, based in Massachusetts, to merge with CBT, a Connecticut bank holding company; and Bank of Boston Corporation, also based in Massachusetts, to acquire Colonial Bancorp, Inc., of Connecticut.

3/ Massachusetts, Connecticut, and the various banking corporations involved intervened in the proceedings before the Second Circuit Court of Appeals.

the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(a)(1), which prohibits a bank holding company from acquiring any bank located outside the bank holding company's home state, unless the laws of the bank's home state expressly authorize the acquisition. The petitioners grounded their constitutional challenge to the Board's decision on the fact that the Massachusetts Act and Connecticut statute each permit only New England bank holding companies to acquire Massachusetts and Connecticut banks. The Court of Appeals found that the Douglas Amendment, as a congressional grant of authority to the states, made the Massachusetts Act and the Connecticut statute "'invulnerable' to challenge under the Commerce Clause." (Pet. App. 30-31). Moreover, the court, as the Board before it, found

no "agreement" between states which violated the Compact Clause and, even treating the statutes as a compact, they did not create a threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause. (Pet. App. 31-32).

REASONS FOR DENYING THE WRIT

The Joint Brief In Opposition filed by the intervenor-respondent banking corporations describes in detail the procedural background and statutory framework for this petition. That Joint Brief includes a lengthy discussion of the case law, statutory authority, and legislative history, which demonstrates that the Massachusetts Act and its Connecticut counterpart do not violate the Constitution. Analysis under standard principles

of statutory interpretation demonstrates that Congress, in enacting the Douglas Amendment, explicitly authorized the actions taken by the Commonwealth and Connecticut. The Commonwealth will not reiterate those arguments here, as it concurs with and relies upon the legal analysis contained in the Joint Brief. Instead the Commonwealth will demonstrate that, in the context of this nation's interstate banking policies, practices and the historical regulatory role played by states, this case does not merit review by this Court.

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH LONG-STANDING CONGRESSIONAL POLICY AND DOES NOT MERIT REVIEW.

A. This Case Will Not Have Significant Practical Consequences In The Regulation Of Bank Expansion.

Petitioners assert that the Second Circuit's decision will cause a chain of events to occur that will ultimately subject the "nation's banking system to substantial confusion and mischief." (Pet. 13) Petitioners paint a picture of a legally and economically homogeneous federal system, within which the Massachusetts Act and the Connecticut statute will "pit state against state" and bring about "artificial divisions and unintended fragmentation." (Pet. 12, 13). This portrait, however, does not accurately portray the reality of contempo-

rary banking which is already subject to state and local control, nor does it accurately describe the relatively slight changes that may result when states allow interstate banking under the Douglas Amendment, as Massachusetts has done.

Regardless of the outcome of this case, the states will continue to have considerable authority in regulating banks and banking expansion. Reversal of the Second Circuit's decision would still leave the states with the authority to prohibit interstate banking. Contrary to the unified federal system depicted by petitioners, bank regulation has always been, and will remain, a state-by-state regulatory quilt.

While bank policy remains important to both Congress and the states, this case has much less practical importance

than petitioners claim for the decision will not have major new economic and regulatory consequences. Furthermore, whatever consequences do flow from the Second Circuit's decision will remain under the scrutiny of and subject to the control of Congress. Given the relatively tame consequences of this case and the ability and power of the Congress to control bank policy if it concludes that those consequences are not desirable, this case does not merit plenary review.

B. States Have Historically Had Considerable Authority Over Bank Expansion.

"There has long been opposition to the exercise of federal power in the banking field." First National Bank of

Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966). This opposition stems, at least in part, from a concern with an excessive concentration of economic power in large financial institutions. Geographic Restrictions on Commercial Banking -The Report of the President, Department of the Treasury at 1 (1981) (hereinafter "1981 Report"); See generally, A. Schlesinger, Jr., The Age of Jackson. One area of considerable concern has been the abilities of banks to expand geographically, since one obvious way to grow is to expand the areas and population served by a bank. Expansion, however, may make banks less sensitive to the needs of the local communities which originally spawned the banks.

Consequently, the United States banking industry has long been fragmented, with a decentralized structure and local control over banking. 1981 Report at 1. A dual system exists in which the federal government and the states each charter banking institutions. A complex network of federal regulation influences the state system, while simultaneously various important deferrals to the states occur within the federal scheme. Almost uniformly, the states have prohibited banks from expanding across state borders by preventing out-of-state banks from opening in-state branches and, indeed, many states prohibit or seriously limit branch banking by in-state banks. 1981 Report; Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1 (1977).

Congress initially expressed its intent to defer to the states on the issue of geographic expansion by banks in the McFadden Act, 12 U.S.C. § 36, adopted in 1927 and amended in 1933, which provides that national banks have the same authority to establish branch as do state banks under the pertinent state law. The McFadden Act resulted, in part, from congressional opposition to the branching principle because it threatened small, independent banks. See S. Rep. No. 666, 68th Cong. 1st Sess. (1924); 67 Cong. Rec. 3,226-33, 1,394-97, 11,766-79 (1926); 68 Cong. Rec. 3,576-78, 5,812 (1927); Glidden, Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Bank System?, 1980 U. Ill. L.F. 369, 377.

Under the McFadden Act, even banks chartered by the federal government could not operate nationally -- national banks remained confined in the same geographic compartments as state banks, able to expand by branching only in accordance with state policy. First National Bank of Logan, 385 U.S. at 260. With the approval of Congress, the states adopted a broad spectrum of branch banking statutes, reflecting local views of appropriate banking policy, ranging from statewide branching to a total ban on branching. Glidden, 377.

In response to the narrow state branching laws imposed on national banks through the McFadden Act, bank holding companies evolved in order to evade the

restrictive statutes.[4/] Id. at 380. As a result, Congress reacted to this phenomenon by passing the Bank Holding Company Act of 1956 ("the BHCA"), 12 U.S.C. §§ 1841 et seq., including the Douglas Amendment at issue here. The BHCA "was designed to prevent the concentration of banking resources in the hands of a few financial giants" and "was intended to implement a congressional policy against control of banking and non-banking enterprises by a single business entity." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 46 (1980). Viewed in this light, the Douglas Amend-

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4/ Holding companies began to acquire banks in different states to avoid the McFadden Act and state branching limitations; since the banks themselves did not open new offices, branching laws did not apply. Glidden, 380-382.

ment is but another expression of congressional deference to the states; it prohibits the Board from approving any interstate acquisition of a bank by a bank holding company unless the state in which the bank is located has passed a statute expressly authorizing the acquisition.

The petitioners and the private intervenors have discussed the legislative history of the Douglas Amendment in detail. Whatever else may be said of the Douglas Amendment, the Commonwealth submits that undoubtedly it reflects a continuing congressional intent to provide the states with authority to establish policy concerning the geographic expansion of banks.

Banking, therefore, has never operated under the unified federal economic umbrella that the petitioners seek to

raise for protection. The banking industry has a history of deliberate fragmentation, with overlapping yet distinct regulatory authorities and considerable state autonomy.

The Commonwealth has its own long-settled policy of careful regulation of the Massachusetts banking industry. Its statutes distinguish among banking corporations and provide the different categories of banks with a variety of powers, including, among others, the power to receive deposits, the power to lend money, and the power to invest in different kinds of securities. See., e.g., Mass. Gen. Laws Ann. ch. 167, §§ 51, 51A; Mass. Gen. Laws Ann. ch. 167D, § 2; Mass. Gen. Laws Ann. ch. 168, §§ 54, 55; Mass. Gen. Laws Ann. ch. 170, §§ 22, 25, 26 (West 1984). The Massachusetts Legis-

lature has also enacted a number of provisions which carefully limit the powers and authorities of those corporations. See, e.g., Mass. Gen. Laws Ann. ch. 167D, § 3; Mass. Gen. Laws Ann. ch. 168, §§ 31, 31A; Mass. Gen. Laws Ann. ch. 171, §§ 13, 21 (West 1984).

In consonance with this historical control over banking, until 1982 the Commonwealth totally prohibited banks located outside Massachusetts from merging with Massachusetts banks or setting up branches in Massachusetts. The 1982 statute challenged here is merely a small, tentative step beyond the traditional insulation of the Massachusetts banking industry and toward the open, nationally uniform system to which the petitioners aspire. It opens the Commonwealth only to the relatively small

group of banks located in the other New England states. This cautious venture into interstate banking reflects the Massachusetts Legislature's continuing interest in retaining control over bank expansion, an interest consistent with the Supreme Court's recognition that banking is "of profound local concern." Lewis, 447 U.S. at 38.

The Commonwealth's control over banking expansion, though, has distinct limits. Just as banking institutions altered their forms to avoid the reach of the McFadden Act and state laws, they have maneuvered to avoid the restraints imposed by the BHCA, the Douglas Amendment, and state laws. Since 1956, numerous banks and financial institutions have expanded rapidly into interstate commerce in a wide variety of incarnations. This

growth of hybrid financial institutions and of banks providing new and different commercial services has led states to become even more vigilant in patrolling the boundaries still protected.

The petitioner Citicorp has already grown lengthy interstate banking and financing tentacles from its New York base.[5/] The BCHA defines a "bank" as an institution organized under federal or state law which both accepts demand deposits and engages in the business of

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5/ Perhaps the most telling evidence of this growth lies in the 20 page list of subsidiaries and affiliates, excluding wholly owned subsidiaries, filed by Citicorp under Supreme Court Rule 28.1. Many of those entities listed clearly operate in foreign countries, but many also appear to be operating in the United States.

making commercial loans. 12 U.S.C. § 1841(c). Thus the Commonwealth may not prevent out-of-state bank holding companies, including Citicorp, from establishing commercial loan offices, consumer finance companies, and mortgage companies in Massachusetts, or from providing numerous other financial services.[6/] While Massachusetts has prevented the expansion of traditional banks across its state lines, financial entities have crossed with impunity by altering their forms and functions.

6/ Contrary to the petitioner's claims, (Pet. 27, n. 43), the Garn-St. Germain Act of 1982 allows federally assisted failing-bank acquisitions by out-of-state bank holding companies, specifically excluding failing-bank acquisitions from the reach of the Douglas Amendment. See 12 U.S.C. § 1823(f)(4)(i).

The Act therefore represents simply another regulatory measure taken within a context of historical policies and long-established legal principles that give deference to states in determining the growth of banking institutions. Simultaneously, petitioners have great leeway to expand their services beyond state boundaries by tailoring their banking entities in garb that shields them from the BHCA proscriptions. While bank policy is of moment to the Commonwealth and the nation, this case will not have the serious repercussions claimed by petitioners.

C. Congress Has Authority to Approve or Disapprove The Consequences Of The Decision Of The Court Of Appeals.

Any events that do follow from the Second Circuit's decisions will occur under the full view of Congress. If the

banking industry perceives radical changes resulting from the Second Circuit's decision, Congress will either approve or disapprove of those changes. Approval or disapproval, though, should result from a policy assessment of how banking expansion should proceed, a task best left to Congress.

Resolution of this case centers on a determination of the scope of the Douglas Amendment, enacted almost thirty years ago. If Congress disapproves of the Board's and the Second Circuit's interpretation of the Douglas Amendment, it may legislate the interstate banking boundaries it deems proper. This Court, however, should leave to Congress the policy decision of what, if any, revisions are appropriate in the laws governing interstate banking in light of

the events that have occured and institutions that have arisen since enactment of the BHCA.

CONCLUSION

For reasons stated above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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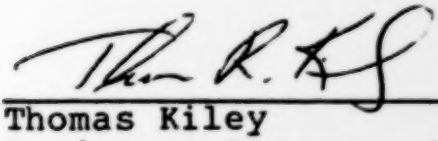

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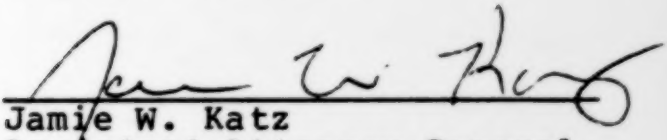

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